

1988

Anastacio Fernandez v. Gerald Cook : Brief of Respondent

Utah Supreme Court

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R. Paul Van Dam; Attorney General; Dan R. Larsen; Assistant Attorney General; Attorney for Respondent.

Robert M. Archuleta; Attorney for Petitioner.

Recommended Citation

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8803³³⁴B9

IN THE SUPREME COURT OF THE STATE OF UTAH

ANASTACIO FERNANDEZ, JR., :
Petitioner/Appellant, : Case No. 8803³³⁴~~89~~
v. :
GERALD COOK, Warden, Utah : Priority No. 3
State Prison, Department of :
Corrections, State of Utah, :
Respondent/Appellee. :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM A DISMISSAL OF A PETITION FOR
WRIT OF HABEAS CORPUS IN THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE JOHN A. ROKICH,
JUDGE, PRESIDING.

R. PAUL VAN DAM
Attorney General
DAN R. LARSEN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

ROBERT M. ARCHULETA
333 South Denver Street
Salt Lake City, Utah 84111

Attorney for Appellant

F I L

MAR 27 1983

Clerk, Supreme Court, Utah

ANASTACIO FERNANDEZ, JR., :
 :
 : Petitioner/Appellant, : Case No. 880389
 :
 v. :
 :
 : GERALD COOK, Warden, Utah : Priority No. 3
 : State Prison, Department of :
 : Corrections, State of Utah, :
 : Respondent/Appellee. :

.....

R. PAUL VAN DAM
Attorney General
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236 State Capitol
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ANASTACIO FERNANDEZ, JR.,	:	
Petitioner/Appellant,	:	Case No. 880389
v.	:	
GERALD COOK, Warden, Utah	:	Priority No. 3
State Prison, Department of	:	
Corrections, State of Utah,	:	
Respondent/Appellee.	:	

.....

This appeal is from a dismissal of a Petition for Writ of Habeas Corpus in the Third Judicial District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2(3)(i) (Supp. 1988).

1. Whether the trial court properly found that petitioner's claims were procedurally barred because petitioner stipulated to a dismissal of his direct appeal?

Rule 65B(i), Utah Rules of Civil Procedure (Supp. 1988).

(1) Any person imprisoned in the penitentiary or county jail under a commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any proceedings which resulted in his commitment there was a

substantial denial of his rights under the Constitution of the United States or of the state of Utah, or both, may institute a proceeding under this rule.

Such proceedings shall be commenced by filing a complaint, together with a copy thereof, with the clerk of the court in which such relief is sought. The complainant shall also serve a copy of the complaint so filed upon the attorney general of the state of Utah if imprisoned in the state prison, or the county attorney of the county where imprisoned if in a county jail. Such service may be made by any of the methods provided for service in Rule 4 of the Utah Rules of Civil Procedure, or by mailing such copy to the attorney general or county attorney by United States mail, postage prepaid, and by filing with the clerk of said court a certificate of mailing certifying under oath that a copy was so mailed to the attorney general or county attorney. Upon filing of such a complaint, the clerk shall promptly bring the same to the attention of the presiding judge of the court in which such complaint is filed.

(2) The complaint shall state that the person seeking relief is illegally restrained of his liberty by the defendant; shall state the place where he is so restrained; shall state the dates of and identify the proceedings in which the complainant was convicted and by which he was subsequently confined and of which he now complains; and shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated. The complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations, or shall state why the same are not attached.

The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceeding; and if the complainant shall have instituted prior similar proceedings in any court, state or federal, within the state of Utah, he

shall so state in his complaint, shall attach a copy of any pleading filed in such court by him to his complaint, and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint, giving written notice thereof by mail to the complainant, and no further proceedings shall be had on such complaint.

(3) Argument, citations and discussion of authorities shall not be set forth in the complaint, but may be set out in a separate supporting memorandum or brief if the complainant so desires.

(4) All claims of the denial of any of complainant's constitutional rights shall be raised in another subsequent proceeding except for good cause shown therein.

(5) [Deleted.]

(6) Within ten days after service of a copy of the complaint upon him, the attorney general, or the county attorney, as the case may be, shall answer the complaint or otherwise plead thereto. Any further pleadings or amendments shall be in conformity with the Utah Rules of Civil Procedure.

(7) When an answer is filed, the court shall immediately set the case for a hearing within twenty days thereafter unless the court in its discretion determines that further time is needed. Prior to the hearing, the state or county shall obtain such transcript of proceedings or court records as may be relevant and material to the case. The court, on its own motion, or upon the request of either party, may order a prehearing conference if good reason exists therefor; but such conference shall not be set so as to unreasonably delay the hearing on the merits of the complaint. The complainant shall be brought before the court for any hearing or conference.

If the court in which the complaint is filed determines that in the interest of

convenience and economy, the hearing should be transferred to the district court having jurisdiction over the place of confinement of complainant, the court may enter a written order transferring such case and shall set forth in such order its reasons for so doing.

(8) In each case, the court, upon determining the case, shall enter specific findings of fact and conclusions of law and judgment, in writing, and the same shall be made a part of the record in the case.

If the court finds in favor of complainant, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such further orders with respect to rearraignment, retrial, custody, bail or discharge as the court may deem just and proper in the case.

(9) If the complainant is unable to pay the costs of the proceedings, he may proceed in forma pauperis upon the filing of an affidavit to that effect, in which event the court may direct the costs to be paid by the county in which he was originally charged.

(10) Any final judgment entered upon such complaint may be appealed to and reviewed by the Supreme Court of Utah as an appeal in civil cases.

(Amended, effective Jan. 1, 1985, and March 1, 1988.)

STATEMENT OF THE CASE

Petitioner filed a Petition for Writ of Habeas Corpus on or about April 14, 1988 in the Third Judicial District Court, in and for Salt Lake County, State of Utah. After a hearing on respondent's Motion to Dismiss on July 15, 1988, Judge John A. Rokich dismissed the petition as an attempt to substitute a post-conviction action for a direct appeal. Petitioner appeals.

STATEMENT OF FACTS

Petitioner was convicted of two counts of Rape of a Child after a jury trial held on May 2, 1986 in the First Judicial District Court, County of Cache, State of Utah, Honorable VeNoy Christoffersen, Judge, presiding. (C.R. 50; Addendum "A"; Judgment, Sentence, and Commitment.)¹ Petitioner was sentenced on May 30, 1986 to serve two consecutive minimum mandatory terms of 15 years to life in the Utah State Prison. Id. Petitioner, by and through his attorney Clint S. Judkins, filed a notice of appeal on June 20, 1986. (C.R. 52; Addendum "B"; Notice of Appeal.) On November 1, 1987, this Court vacated petitioner's sentence and remitted the case to the trial court for re-sentencing to concurrent terms of imprisonment. (C.R. 54; Addendum "C"; Remittitur.)

The trial court re-sentenced petitioner on November 30, 1987 and petitioner filed a pro se Notice of Appeal to this Court on December 18, 1987. (C.R. 56-58, 61; Addendums "D" and "E"; Judgment, Re-sentence, and Commitment; Notice of Appeal.) On February 22, 1988, petitioner's present counsel, Robert Michael Archuleta, was retained to prosecute petitioner's appeal, the Brief of Appellant being due on March 7, 1988. (Addendum "F"; Letter.) On March 8, 1988, the day after the Appellant's Brief was due, petitioner's counsel filed a Stipulation for Voluntary Dismissal of Appeal. (Addendum "G"; Stipulation.) Thereafter,

¹ "C.R." refers to the record of the criminal trial court. "H.R." refers to the record of the habeas trial court. Notably, petitioner did not request a transcript of the proceedings in the habeas trial court below. See Designation of Record on Appeal.

this Court dismissed the appeal on March 24, 1988. (Addendum "H"; Remittitur.)

On March 28, 1988, Judge Christoffersen entered a second re-sentencing order that petitioner's sentences are to run concurrently instead of consecutively. (Addendum "I"; Order.) The second re-sentencing order was entered to correct the first re-sentencing order which failed to specify that the sentences were to run concurrent as ordered by this Court. (Addendums "D" and "I"; Judgment, Re-sentence, and Commitment; Order). Petitioner did not file a timely Notice of Appeal to this Court following Judge Christoffersen's second re-sentencing order.

Petitioner filed a Petition for a Writ of Habeas Corpus in the Third Judicial District Court on or about April 14, 1988. A hearing on Respondent's Motion to Dismiss the petition was held on July 15, 1988 before the Honorable John A. Rokich, Third District Court Judge. (Addendum "J"; Minute Entry; Findings, Conclusions, and Order.) After taking the matter under advisement, the trial court dismissed the petition on the grounds that no "unusual circumstances" existed to justify allowing petitioner to utilize a post-conviction remedy as a means to raise issues which could and should have been raised on direct appeal. Id. The trial court specifically found that petitioner had voluntarily dismissed his direct appeal. Id. Petitioner now appeals the trial court's dismissal of his petition.

SUMMARY OF ARGUMENTS

Petitioner filed a notice of appeal from his first resentencing order attacking his conviction and sentence. While the appeal was pending, petitioner determined that his claims were better suited for a collateral post-conviction attack and voluntarily dismissed his direct appeal. After filing a Petition for Writ of Habeas Corpus in the Third Judicial District Court, Judge Rokich, upon the State's motion, properly dismissed the petition on procedural default grounds finding that petitioner had circumvented and deliberately bypassed the regular appellate process without good cause.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY RULED THAT PETITIONER WAS PROCEDURALLY BARRED FOR VOLUNTARILY DISMISSING HIS DIRECT APPEAL IN ORDER TO SEEK POST-CONVICTION RELIEF.

Petitioner contends that Judge Rokich erred in failing to recognize that petitioner's claims were so "rare" that it would be "wholly unconsionable [sic] not to re-examine his conviction." Petitioner's claim should be summarily rejected.

It is well settled law in Utah that if alleged errors could have been raised on direct appeal, this court is "precluded under basic principles of appellate review from addressing them now." Bundy v. DeLand, 763 P.2d 803 (Utah 1988). This Court in Codianna v. Morris, 660 P.2d 1101 (Utah 1983) clearly emphasized the standard for Habeas Corpus review:

It is therefore well settled in this state that allegations of error that could have been but were not raised on appeal from a

criminal conviction cannot be raised by habeas corpus or postconviction review, except in unusual circumstances.

A much-quoted statement of the type of errors that are and are not cognizable by habeas corpus is the following from this Court's unanimous opinion in Brown v. Turner, 21 Utah 2d 96, 98-99, 440 P.2d 968, 969 (1968) (Crockett, C.J.):

[Habeas corpus] is an extraordinary remedy which is properly invocable only when the court had no jurisdiction over the person or the offense, or where the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law, or where some such fact is shown that it would be unconscionable not to re-examine the conviction. If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular prescribed procedure, or the judgment becomes final and is not subject to further attack, except in some such unusual circumstance as we have mentioned above. Were it otherwise, the regular rules of procedure governing appeals and the limitations of time specified therein would be rendered impotent.

Codianna v. Morris, 660 P.2d at 1104-05 (some bracketed material and emphasis in original.) See also State v. West, 765 P.2d 891 (Utah 1988); Murray v. Carrier, 477 U.S. 478 (1986) (Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and undercuts the State's ability to enforce its procedural rules.) The standard of review was further detailed by this Court in Bundy v. DeLand, 763 P.2d 803 (Utah 1988) as follows:

On appeal from denial of habeas corpus relief, "we survey the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted. . . ."

Id. at 805, quoting Velasquez v. Pratt, 21 Utah 2d 229, 232, 443 P.2d 1020, 1022 (1967) (citations omitted).

The present case represents the prototypical circumstance in which to invoke the procedural default rule espoused in Codianna. Petitioner does not claim he was precluded from raising his claims on direct appeal. Nor does petitioner allege "good cause" exists for his procedural default. Instead, petitioner admits that he voluntarily dismissed his direct appeal with the intended purpose of seeking post-conviction relief as a preferred substitute (Brief of App. at pp. 4-5). Petitioner's appellate counsel determined that the issues raised in petitioner's pro se docketing statement were meritless. Id. He further determined that an ineffective assistance of counsel claim was an arguable ground for relief. Id. Rather than seeking to amend the docketing statement on appeal, petitioner's appellate counsel, in consultation with other members of the criminal defense bar, determined that petitioner should dismiss his direct appeal and seek post-conviction relief instead.² Id. Thus, petitioner did not inadvertently fail to raise his claims on direct appeal, but rather, petitioner made a subjective

² It should be noted that defendant failed to file a notice of appeal following Judge Christoffersen's second re-sentencing order on March 28, 1988, and thus, declined a second opportunity to seek direct appellate review of his claims.

determination to deliberately bypass regular appellate review. Petitioner's deliberate bypass of regular appellate review belies the rationale and purpose of Rule 65B(1), Utah Rules of Civil Procedure. See State v. West, 765 P.2d 891, 901 (Utah 1988) (Hall C.J., dissenting) citing generally Murch v. Mottram, 409 U.S. 41, 46 (1972)(per curiam) reh'g denied, 409 U.S. 1119 (1972).

Petitioner argues that Judge Rokich erred in finding no "unusual circumstances" or "good cause" existed to justify an exception to the procedural default rule. Petitioner misapplies the standard.

This Court has held that under "both federal and state law, a petitioner must show cause for a procedural default and the resulting prejudice he suffered." Wells v. Shulsen, 747 P.2d 1043, 1044 (Utah 1987). The fact that a petitioner was subjectively unaware of a possible claim at the time of appeal does not constitute a showing of "good cause" sufficient to negate application of the procedural default rule. State v. West, 765 P.2d at 900 (Hall C.J., dissenting) citing, Murray v. Carrier, 477 U.S. at 486. Rather, the well-established test is whether a petitioner could and should have known of the claimed error at the time of direct appeal. Codianna, 660 P.2d 1104-05.

In the instant case, petitioner admits that he was aware of the claimed errors while his direct appeal was pending, but chose to dismiss the appeal and seek post-conviction relief. No satisfactory explanation exists to justify petitioner's volitional circumvention of the regular appellate process.

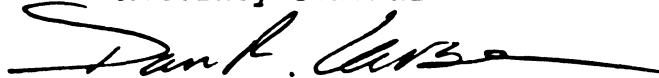
Petitioner's actions amount to nothing less than forum shopping. Accordingly, the trial court properly found procedural default to exist without cause.

CONCLUSION

Based upon the foregoing, respondent respectfully requests this Court to affirm the lower court's dismissal of the Petition for Writ of Habeas Corpus on procedural default grounds.

RESPECTFULLY submitted this 27th day of March, 1989.

R. PAUL VAN DAM
Attorney General



DAN R. LARSEN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Robert M. Archuleta, Attorney for Petitioner, 333 South Denver Street, Salt Lake City, Utah 84111, this 27th day of March, 1989.



ADDENDA

ADDENDUM A

RECEIVED

1986 MAY 30 11:10 53

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

THE STATE OF UTAH,)
Plaintiff,)

vs.)

JUDGMENT OF CONVICTION FOR
SENTENCE AND COMMITMENT

ANASTACHIO FERNANDEZ, JR.)
Defendant.)

Case No. 3425

That whereas, said Defendant, Anastachio Fernandez, Jr., having heretofore on the 2nd day of May, 1986, having been convicted by a jury in this Court to the crime(s) of: Count 1: Rape of a Child, a 1st degree felony, and Count 2: Rape of a Child, a 1st degree felony, and now being present in the Court, accompanied by his attorney, and ready for sentence, thereupon the Court renders its judgment as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the said Defendant be sentenced as follows:

1. Prison: Count 1: Mandatory 15 years. Count 2: Mandatory 15 years. Sentences ordered to run consecutively.

The above-named Defendant is remanded into the custody of the Sheriff of Cache County, State of Utah, to be by him delivered into custody of the Warden, or other proper officer of said Utah State Prison or Cache County Jail, in execution of this judgment and sentence.

WITNESS: Honorable VeNoy Christoffersen, District Judge, and the seal of the District Court of the First Judicial District in and for the State of Utah, affixed this 30th day of May, 1986.


DISTRICT COURT JUDGE

Number 3425-9

FRI MAY 30 1986

WTH S. ALLEN Clerk

ADDENDUM B

Clint S. Judkins
Attorney for Defendant
123 East Main Street
Tremonton, Utah 84337
Telephone: 257-3885

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff,)	
Vs.)	NOTICE OF APPEAL
)	
ANASTACIO FERNANDEZ, JR.,)	Criminal No. 3425
)	
Defendant.)	

COMES NOW Clint S. Judkins and hereby enters his appearance on behalf of the above named Defendant and on behalf of Defendant, ANASTACIO FERNANDEZ, JR., hereby gives notice that ANASTACIO FERNANDEZ, JR., the Defendant above named, hereby appeals to the Utah Supreme Court, State of Utah, from Judgment of the District Court of Cache County, State of Utah, finding Defendant Guilty of Two Counts of Rape of a Child, first degree felonies.


The Trial in this mater was held on May 8th and 9th and sentence was entered on May 30th of 1986.

DATED this 20 day of June, 1986.

Number 3425-11

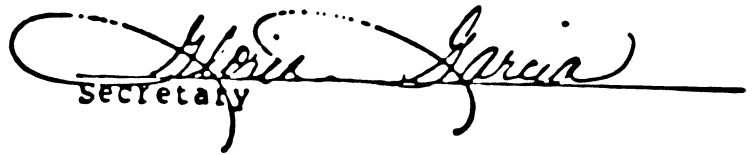
FILED JUN 23 1986

BETH S. ALLEN, Clerk


Clint S. Judkins
Attorney for Defendant

CERTIFICATE OF MAILING

This is to certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to James Jenkins, Deputy County Attorney, 160 North Main, Suite 203, Logan, Utah 84321, this 20 day of June, 1986.


Secretary

ADDENDUM C

IN THE SUPREME COURT OF THE STATE OF UTAH

-----ooOoo-----

Regular May Term, 1987

September 22, 1987

State of Utah,
Plaintiff and Respondent.

REMITTITUR
No. 860338
District No. 3425

v.
Anastacio Fernandez,
Defendant and Appellant.

This cause having been heretofore submitted under Rule 31, and the Court being sufficiently advised in the premises, the majority of the Court views the imposition of consecutive terms of imprisonment as an abuse of discretion. The sentences are vacated and the case is remanded for re-sentencing to concurrent terms of imprisonment, without written opinion.

Regular October Term, 1987

October 13, 1987

Upon consideration of the petition for reconsideration heretofore filed herein, and the arguments of counsel thereupon had, it is ordered that the rehearing be, and the same is, denied.

Issued: November 1, 1987

Record: 1 Volume
3 Envelopes K.P.

Number 3425-18

NOV 1 1987

SETH S. ALLEN, Clerk

 Deputy

054

UNITED STATES OF AMERICA

State of Utah }
County of Salt Lake } ss.

I, GEOFFREY J. BUTLER, Clerk of the Supreme Court of the State of Utah, do
hereby certify that the foregoing is a full, true and correct copy of the judgment rendered
..... order entered

In the foregoing entitled action, now of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand

and affixed the seal of said Supreme Court this

the second

day of November A. D. 19.27..

..... Geoffrey J. Butler
Clerk, Supreme Court

By *Harry Pickering*
Deputy Clerk

ADDENDUM D

IN THE FIRST JUDICIAL DISTRICT COURT

COUNTY OF CACHE, STATE OF UTAH

STATE OF UTAH,)	JUDGMENT, RESENTENCE, AND
)	COMMITMENT PURSUANT TO RULING
Plaintiff,)	OF THE SUPREME COURT DATED
)	SEPTEMBER 22, 1987
vs.)	
)	Case No. 3425
ANASTACIO FERNANDEZ, JR.,)	
)	
Defendant.)	

Defendant, having been convicted by (X) a jury, () the court, () a plea of guilty, () a plea of no contest to the offense of Count 1: Rape of a Child, (X) a 1st degree felony, and Count 2: Rape of a Child, (X) a 1st degree felony, () a class misdemeanor, being now present in court and represented by counsel, and there being no legal reason why sentence should not be imposed, is hereby sentenced as follows:

The Basic Sentence

() For a term not to exceed () months, () days in the () County Jail, () Utah State Prison.

() For a term not to exceed five (5) years.

() For a term not less than one (1) year nor more than fifteen (15) years. (Counts 1 and 2)

() For a term not less than five (5) years and which may be for life.

(X) For a minimum mandatory term of () five (5) years, () ten (10) years, (X) fifteen (15) years, and which may be

() For a minimum mandatory term of () three (3) years,
() six (6) years, () nine (9) years, and which may be for
life.

X) Said sentence is to run () concurrent,
X) consecutive.

() To pay a fine in the amount of \$ plus an additional 25%
surcharge in the amount of \$, for a total of \$. The payment of
the fine and surcharge is ordered pursuant to Utah Code Ann. 76-
3-201(1) and 63-63-9.

() To pay restitution in the amount of \$.

() Upon motion of () the state, () the defense,
() the court, count(s) dismissed.

() The () execution () imposition of the sentence is
stayed and defendant is placed on probation under the supervision
of the Utah Department of Corrections for the period of time
prescribed by law pursuant to the standard conditions of
probation and the following special conditions:

Custody Remand

Defendant is hereby remanded to the custody of:

() the Sheriff of this County.

() the Sheriff of this County for delivery to the
Department of Corrections.

X) the Department of Corrections.

Recommendations

() Pursuant to Utah Code Ann. Section 77-25-13(5), it is the recommendation of this court that defendant serve a term of () years, () months. This recommendation is based upon the following:

() It is the recommendation of this court that defendant be given () days, () months credit for time served in the county jail prior to sentencing.

DATED this 30th day of November, 1987.


DISTRICT COURT JUDGE

ADDENDUM E

1 ANASTACIO FERNANDEZ
2 Attorney Pro Se
3 Post Office Box 250
4 Draper, Utah 84020

5 IN THE FIRST JUDICIAL DISTRICT COURT

6 IN AND FOR THE COUNTY OF CACHE

7 STATE OF UTAH

8 ---ooo0ooo---

9 STATE OF UTAH, : NOTICE OF APPEAL

10 Plaintiff/Respondent; :

11 vs. : Criminal Case No. 3425

12 ANASTACIO FERNANDEZ, :

13 Defendant/Appellant. : Judge Venoy Christoffersen

14 ---ooo0ooo---

15 NOTICE IS HEREBY GIVEN that ANASTACIO FERNANDEZ, Defendant/
16 Appellant, Attorney Pro Se, hereby appeals to the Supreme Court of the
17 State of Utah from the judgement, sentence and commitment entered and
18 dated on the 30th day of November, 1987, by the Honorable Venoy Christoff-
19 ersen, Presiding Judge of the First Judicial District Court, in and for
20 the County of Cache, State of Utah, in the Defendant/Appellant's RESENT-
21 ENCING hearing. This appeal is from the entire order of the above-
22 entitled Court in the Defendant/Appellant's resentencing.

23 DATED on this the 18 day of December, 1987.

24 RESPECTFULLY SUBMITTED,

25 *Anastacio Fernandez*
26 ANASTACIO FERNANDEZ

27 Number 3425-2 Attorney Pro Se/Appellant
28 Post Office Box 250
Draper, Utah 84020

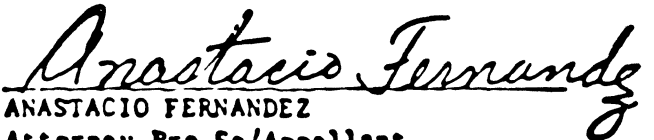
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CERTIFICATE OF MAILING

I, Anastacio Fernandez, hereby certify that I have mailed a true and correct photocopy of the foregoing NOTICE OF APPEAL, postage prepaid, to the following on this the 18 day of December, 1987.

(1) JAMES C. JENKINS
Deputy County Attorney
67 East 100 North
Logan, Utah 84321


ANASTACIO FERNANDEZ
Attorney Pro Se/Appellant
Post Office Box 250
Draper, Utah 84020

ADDENDUM F

ROBERT MICHAEL ARCHULETA

Attorney at Law
333 South Denver Street
Telephone (801) 364-6522

February 22, 1988

First Judicial District
Honorable VeNoy Christensen
160 North Main
Logan, Utah 84321

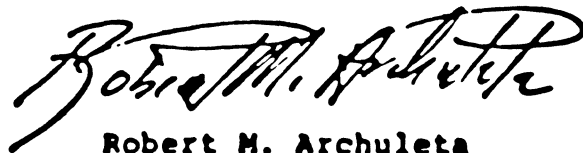
Re: State of Utah vs. Anastacio Fernandez
PreSentence Report - Case No. 3425

Dear Judge Christensen:

The Defendant, Anastacio Fernandez, has appealed the Judgment, Sentence and Commitment entered by you on November 30, 1987 Pro Se, but has now retained me to perfect and argue his Appeal. Appellant's Brief is due March 7, 1988 and accordingly, I will need a copy of the PreSentence Report prepared by the Department of Corrections, Adult Probation and Parole as soon as possible as time is of the essence.

Accordingly, I have prepared an Ex Parte Motion and Order for Release of the PreSentence Report which I am requesting that you execute immediately, and please direct the appropriate party to forward the same to my office immediately. I am thanking you in advance for your help.

Very truly yours,



Robert M. Archuleta
Attorney at Law

RMA/les
Encl.

ADDENDUM G

30-14

ROBERT M. ARCHULETA, #121
Attorney for Defendant
333 South Denver Street
Salt Lake City, Utah 84111
Telephone: (801) 364-6522

FBI # 100
MAR 7 1988

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

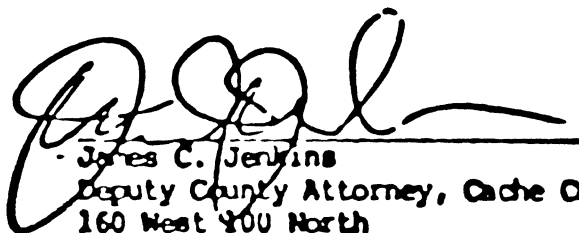
ANASTACIO FERNANDEZ,

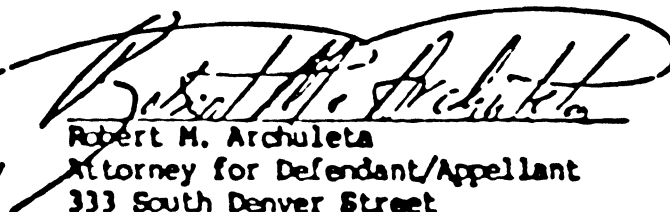
Defendant and Appellant.

:
:
:
: STIPULATION - VOLUNTARY
: DISMISSAL OF APPEAL URAP -
: RULE 37
:
:
:
: No. 870501
: Lower Docket No. 3425

COMES NOW James C. Jenkins, Deputy County Attorney for Cache County, State of Utah and Robert M. Archuleta, Attorney for Anastacio Fernandez, Jr., Defendant/Appellant Herein and Stipulate pursuant to Utah Rules of Appellate Procedure, Rule 37(b) that the above Appeal regarding sentencing disposition only by the Honorable Venby Christopherson be voluntarily dismissed.

DATED this 8 day of March, 1988.


James C. Jenkins
Deputy County Attorney, Cache County
160 West 400 North
Logan, Utah 84321


Robert M. Archuleta
Attorney for Defendant/Appellant
333 South Denver Street
Salt Lake City, Utah 84111

OK
Lester / Burke

ADDENDUM H

IN THE SUPREME COURT OF THE STATE OF UTAH

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Regular February Term, 1988

March 14, 1988

State of Utah,
Plaintiff and Respondent,

REMITTITUR
No. 870501
District No. 3425

v.
Anastacio Fernandez,
Defendant and Appellant.

Upon stipulation of counsel for the respective parties
herein, it is ordered that this appeal be, and the same is, dismissed.

Issued: March 24, 1988

Record: 1 Volume
5 Envelopes

Number 3425-27

MAR 25 1988

RECEIVED

UNITED STATES OF AMERICA

State of Utah
County of Salt Lake } ss.

I, GEOFFREY J. BUTLER, Clerk of the Supreme Court of the State of Utah, do

hereby certify that the foregoing is a full, true and correct copy of the judgment rendered

.....order entered.....

In the foregoing entitled action, now of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand

and affixed the seal of said Supreme Court this

thetwenty-fourth.....

day ofMarch.....A. D. 19..88..

.....GEOFFREY J. BUTLER.....

Clerk, Supreme Court

By*Harry Pickering*.....
Deputy Clerk

ADDENDUM I

Clint S. Judkins
Attorney for Defendant
Utah Bar No. 1763
P.O. Box 277
Tremonton, Utah 84337
Telephone: 257-3885

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH

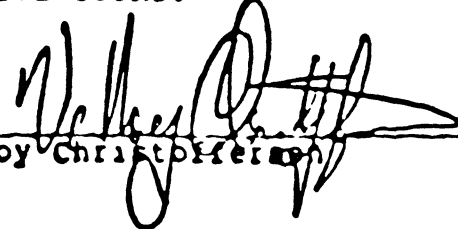
STATE OF UTAH,)	
)	ORDER
Plaintiff,)	
Vs.)	
)	
ANASTACIO FERNANDEZ, JR.,)	
)	
Defendant.)	Case No. 3425

Pursuant to the Minute Order, entered September 22nd, 1987, by the Utah Supreme Court, in case no. 860338 (870751), it is hereby,

ORDERED, that the sentences previously given to the Defendant on May 30th, 1985 shall run concurrently instead of consecutively.

DATED this 28th day of March, 1988.

BY THE COURT:



Venoy Christopher

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing document to Mr. Jim Jenkins, Deputy County Attorney, P.O. Box 3700, Logan, Utah 84321, this 24th day of March, 1988.

Number 3425-28 

Secretary

ADDENDUM J

(✓ PARTIES PRESENT)

COUNSEL:

(✓ COUNSEL PRESENT)

ASTACIO FERNANDEZ, JR.

ROBERT ARCHULETTA

RECEIVED

JUL 20 1988

AH STATE PRISON WARDEN, ETAL.

BARBARA BEARNSON

JUNLY GENERAL

big Ludwig

CLERK

thy Schultz

REPORTER

hn Tingey

MAJOR

HON. JOHN A. RORICH

JUDGE

DATE: JULY 21, 1988

Petitioners petition for Writ of Habeas Corpus was heard on the 15th
 y of July 1988. The petitioner was present represented by Robert M.

chuletta, the State of Utah was represented by Ms. Barbara Bearnson.

The court having read the memoranda filed by counsel and hearing oral
 quement took the matter under advisement. The court now enters its
 ling.

The principal issues raised by petitioner are; ineffective counsel
 l trial by an impartial jury.

In reviewing the file, the court notes that there were two appeals
 ed and both voluntarily dismissed. The court can understand that counsel
 resenting petitioner at the trial would not raise the issue of ineffective
 nsel on appeal. However, in this case the court did remit the case to
 trial court for resentencing which allowed the petitioner to file
 her appeal. The petitioner did file an appeal and engaged Mr.
 uletta, attorney at law to represent him on appeal. Mr. Archuletta
 ed a stipulation for voluntary dismissal of the appeal and as a result
 Supreme Court dismissed the appeal.

FILE: (- PARTIES PRESENT)COUNSEL: (- COUNSEL PRESENT)NASTACIO FERNANDEZ, JR.ROBERT ARCHULETTA'S.TAH STATE PRISON WARDEN, ETAL.BARBARA BEARNSONraig LudwigCLERKathy SchultzREPORTERohn TingeyCLERKHON. John A. RokichJUDGEDATE: July 21, 1988

Petitioner cannot now utilize a post conviction remedy as means to raise issues which should have been raised on a direct appeal, except in unusual circumstances Codianna v. Morris 660 P2d 1101 - 1104 Ut-1983.

The court does not find unusual circumstances which fall within the exception and therefore dismisses the Writ of Habeas Corpus.

DAVID L. WILKINSON (3472)
Attorney General
DAN R. LARSEN (4865)
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

ANASTACIO FERNANDEZ,	:	
	:	FINDINGS OF FACT
Petitioner,	:	CONCLUSIONS OF LAW
	:	
v.	:	
	:	
GERALD L. COOK, Warden,	:	Case No. C88-2435
Utah State Prison, Department	:	
of Corrections, State of Utah,	:	Judge John A. Rokich
	:	
Respondent.	:	

The above-entitled matter came on regularly for hearing on respondent's Motion to Dismiss on July 15, 1988 at the hour of 1:00 p.m. before the Honorable John A. Rokich, Judge, presiding. Petitioner was present with counsel, Robert Archuleta. Respondent was represented by Barbara Bearnson, Assistant Attorney General. The Court having reviewed the file, heard arguments, and taken the matter under advisement, now enters the following:

FINDINGS OF FACT

1. That the issues raised by petitioner are: (1) ineffective assistance of trial counsel; and (2) jury bias.
2. That the Utah Supreme Court remitted petitioner's conviction to the trial court for re-sentencing which allowed petitioner to file another appeal.
3. That petitioner did file an appeal and engaged Robert Archuleta, attorney at law, to represent him on appeal.
4. Mr. Archuleta filed a stipulation for voluntary dismissal of the appeal and, as a result, the Supreme Court dismissed the appeal.
5. That no unusual circumstances exist which may justify the substitution of post-conviction remedies for direct appeal.

CONCLUSION OF LAW

1. That petitioner cannot now utilize a post-conviction remedy as a means to raise issues which should have been raised on direct appeal, absent unusual circumstances. Codianna v. Morris, 660 P.2d 1101, 1104 (Utah 1983).

DATED this 18th day of August, 1988.

BY THE COURT:

151

JOHN A. ROKICH
District Judge

DAVID L. WILKINSON (3472)
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DAN R. LARSEN (4865)
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

ANASTACIO FERNANDEZ,	:	
Petitioner,	:	ORDER
v.	:	
GERALD L. COOK, Warden,	:	Case No. C88-2435
Utah State Prison, Department	:	
of Corrections, State of Utah,	:	Judge John A. Rokich
Respondent.	:	

The above-entitled matter came on regularly for hearing on respondent's Motion to Dismiss on July 15, 1988 at the hour of 1:00 p.m. before the Honorable John A. Rokich, Judge, presiding. Petitioner was present with counsel, Robert Archuletta. Respondent was represented by Barbara Bearnson, Assistant Attorney General.

The Court having entered its Findings of Fact and Conclusions of Law and good cause appearing therefore, it is hereby;

ORDERED, ADJUDGED and DECREED as follows:

1. That the Petition for Writ of Habeas Corpus is dismissed.

DATED this 10th day of August, 1988.

BY THE COURT:

151
JOHN A. ROKICH
District Judge

CERTIFICATE OF MAILING

I hereby certify that true and accurate copies of the foregoing Findings of Fact, Conclusions of Law, and Order were mailed, postage prepaid, to Robert M. Archuleta, attorney for appellant, 333 South Denver Street, Salt Lake City, Utah 84111, this 3rd day of August, 1988.

Brenda Stubbs